No. 16509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

PETITIONER'S REPLY BRIEF.

JAMES J. ARDITTO,
727 West Seventh Street,
Los Angeles 17, California,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 16509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

A. FOREWORD.

Inasmuch as we are dealing with proposed deficiencies for the fiscal years ended November 30, 1954 and November 30, 1955, it is true (Sec. 7851(a)(6) of IRC 1954) that we are concerned with both the old (IRC 1939) and new (IRC 1954) Internal Revenue Codes (called IRC). However, as pointed out by Respondent in a footnote, at page 5, to his brief, the pertinent sections (272 of the 1939 Code and 6212 and 6213 of the 1954 Code) are substantially the same.

Petitioner, for brevity's sake, referred to the 1954 Code Sections while Respondent refers to the 1939 Code Sections (See pp. 16-18 of Resp. Reply Br.).

Respondent devotes considerable attention to Section 7502(a) of IRC of 1954 which treats timely *mailing* of a Petition for Redetermination as timely *filing-provided* the *mailing* occurs prior to or on the 90th day after a

deficiency notice is *properly* mailed. (See Resp. Reply Br., pp. 4-5, 11-12.)

In this case, Petitioner readily admits that the Tax Court did *not* have jurisdiction *if* Respondent mailed his "90 day letter" to the "last known address" of Petitioner.

Petitioner is *not* appealing "for sympathy" (see p. 14 of Resp. Br.) and understands that the Tax Court is a tribunal of limited jurisdiction (p. 10 of Resp. Br.).

However, the Respondent has failed completely to grasp that Petitioner is contending that the "Pleadings" in this case [Tr. pp. 17-25] raised the question whether Respondent mailed his Notice of June 12, 1958, to Petitioner's address last known to Respondent.

The Tax Court fully understood the effect *of these pleadings* because in its opinion *of March 20, 1959* [Tr. pp. 25-27] that Court said, in effect, even *if* the Petitioner proves that the June 12, 1958 Notice was mailed to an erroneous address *nevertheless* the Court did *not* have jurisdiction because the Respondent's *personal* (manual) service of July 17, 1958 was not the *type of service* that could give the Tax Court jurisdiction.

Therefore, the Tax Court concluded that a hearing to determine whether these "pleadings" could be sustained by Petitioner was not necessary or called for.

Petitioner respectfully disagrees with the Tax Court because:

(1) If the Hearing proved that the 90-day letter was *improperly* mailed, then the Petition should have been dismissed (and for *that* reason)—unless

(2) The Hearing proved that there was personal service on July 17, 1958, and the Tax Court decided to follow the decision of this Court in *Boren v. Riddell,* 241 F. 2d 670.

If the Tax Court, after such Hearing, found *improper* mailing of the 90-day letter (but personal service on July 17, 1958), then it had the following choices:

(a) Dismiss Petition on theory that Respondent did not comply with Sections 272 (K) (IRC 1939) or 6212 (b)(1) (IRC 1954), and hold that it could not acquire jurisdiction because of personal service and the filing of a Petition within 90 days thereof; or

(b) Vacate its Order granting Respondent's Motion to Dismiss by relying on the *Boren* case, *supra,* and proceed to hear the case (including any special defenses such as Statute of Limitation).

The consequences to Petitioner (as pointed out by *D'Andrea v. Commissioner,* 263 F. 2d 904) are considerably different if:

(a) The Tax Court and this Court hold that the former Court can only acquire jurisdiction by the Respondent mailing a Registered Notice to the right address; or

(b) This Court holds, as in the *Boren* case, *supra,* that the Tax Court can acquire jurisdiction by the Respondent effecting personal service and Petitioner mailing his Petition within 90 days of such service.

A hearing is necessary to determine *if* the 90-day letter was mailed, by Respondent, to the right address. If it is concluded, after hearing, that it was so mailed, then Petitioner can only pay the taxes and sue for refund thereof. (Section 7422(a) of IRC 1954.)

If it is concluded, at such hearing, that the Notice (90-day letter) was sent to the *wrong* address, then the

Respondent cannot attempt to collect the taxes in question unless this Court disagrees with the Tax Court (and Respondent) and follows the rule of the *Boren* case, *supra,* and holds the Tax Court acquired jurisdiction by the personal service of July 17, 1958, and the mailing (and receipt) of the Petition within 90 days thereof.

B. ARGUMENT.

The Tax Court Erred in Dismissing the Petition Without Holding a Hearing.

I.

A Hearing Is Necessary to Determine Whether the Notice of Deficiency Was Properly Mailed by Respondent.

The pertinent Sections of IRC of 1939 and 1954 require that a Notice of Deficiency be mailed to a taxpayer "at his last known address". (Sec. 272(K) and Sec. 6212(b)(1), respectively—See p. 17 of Resp. Br.)

Both parties to this appeal agree on this statutory requirement—if service is attempted by registered mail.

Petitioner, after realizing (*subsequent* to the time it received the Court's order of dismissal of February 9, 1959) that Respondent was relying on the fact that he had mailed the June 12, 1958 notice to a *former* address of Petitioner, filed its various motions with the Tax Court wherein it "alleged" that its address "last known to Respondent" was c/o Nathan Stein, Temple Hospital, Hoover Street, Los Angeles, and asked the Tax Court to grant it a hearing to determine this "basic fact". [Tr. pp. 17-25.]

Petitioner respectfully submits that the issue presented by these "pleadings" cannot be decided until a hearing is scheduled by the Tax Court and the "facts" ascertained.

Respondent seems to argue that a taxpayer can only change (for this purpose) his address by formal written

communication to a District Director or to Respondent or one of his deputies.

The only statutory provision Petitioner was able to find on this point is that contained in Sections 272(K) and 6212(b)(1) and only relating to the existence of a fiduciary relationship—which is not pertinent herein.

Petitioner respectfully submits that if it proves its allegations relative to informing revenue agents—WHILE THEY WERE AUDITING TAXPAYER FOR THE YEARS IN QUESTION—it will have established that Respondent did *not* mail the notice in question "to taxpayer at his last known address".

The notice of change given herein was not the general vague type of notice referred to in the cases cited by Respondent at bottom of page 8 of his Brief.

II.

While the Requirement of Filing a Petition Within 90 Days Is Jurisdictional, This Requirement Is Satisfied if It Is Filed Within 90 Days of Personal Service (After Registered Mail Is Sent to Wrong Address).

The facts in this case are fairly simple—to wit:

The Respondent mailed (Registered) a notice of deficiency to Petitioner on June 12, 1958, to 3421 West Second Street, Los Angeles 4, California.

Taxpayer alleges that prior to June 12, 1958, it notified Respondent (through its agents) that any such notice should be mailed to another address. [Tr. 17-25.]

On July 17, 1958 (with the June 12, 1958 registered letter having been returned marked "Not known at this address") the Respondent had his agents personally serve this *same* notice on taxpayer.

On October 3, 1958, taxpayer mailed its Petition for Redetermination to the Tax Court (unaware of the mailing of the registered letter of June 12, 1958), and the Petition was received on October 7, 1958. (Both *mailing* and *receipt* (by Tax Court) dates within 90 days of *July 17, 1958.*)

Respondent, at pages 10-15 of his Reply Brief, agrees with the Tax Court that it can only acquire jurisdiction if:

(a) Notice of Deficiency is mailed (registered) to last known address of taxpayer; and

(b) Petitioner mails his Petition within 90 days of date notice is so mailed.

Contrary to Petitioner's position—Respondent states Petitioner "urges the proposition that it is entitled to compute * * * 90 days from date of actual receipt of notice * * *" (p. 14, Resp. Reply Br.)—When Notice Is Mailed to Taxpayer's Last Known Address.

It is only where—as in the present case—the Notice is Not mailed to taxpayer's last known address but is subsequently (or for the first time) personally served that Petitioner believes the *Boren* case, *supra,* holds that the Tax Court has jurisdiction *if* a taxpayer, within 90 days thereof, mails his Petition to the Tax Court.

Respondent assumes throughout his Reply Brief (and particularly at pages 10-15 of his Reply Br.) that the Notice of Deficiency was mailed to "taxpayer's last known address".

If that was conceded (and the opposite Not pleaded), Petitioner would also concede that the Tax Court did not have jurisdiction—and Petitioner's only remedy would be to pay the tax and sue for refund.

C. CONCLUSION.

Petitioner respectfully submits that the Tax Court should be directed to hold a hearing to ascertain whether the notice in question was mailed to the "last known address of taxpayer," and, if it then concludes that the 90-day letter was not so mailed, to then proceed in accordance with the decision of this Court in *Boren v. Riddell,* 241 F. 2d 670—or dismiss the Petition for failure to mail the 90-day letter to the right address:

DATED: December 1, 1959.

Respectfully submitted,

JAMES J. ARDITTO,

Attorney for Petitioner.